speech under the First Amendment of the United States Constitution. . . . After reviewing the complaint, and after consideration of defendant's motion to dismiss and the People's opposition thereto, the court concludes that the accusatory instrument is facially sufficient. Therefore, and for the following reasons, defendant's motion is denied.

Penal Law section 240.08 provides that a person is guilty of inciting to riot "when he urges ten or more persons to engage in tumultuous and violent conduct of a kind likely to create public alarm." Although Penal Law section 240.08 does not expressly provide for the element of intent, courts have recognized that in order to pass constitutional muster, the incitement statute necessarily includes the "elements of 'intent' and 'clear and present danger' before one's freedom of speech may be abridged under the First Amendment." "Thus, the People must prove not only that defendant's conduct . . . created a clear and present danger of riotous behavior, but also that by such conduct he in fact intended a riot to ensue." The complaint contains the following narrative of defendant's alleged criminal conduct:

> Deponent [Police Officer Charles Carlstrom] states that he observed each defendant at [234 W. 42nd Street in the County and State of New York] yelling and stating in substance: IT'S GOOD THAT THE WORLD TRADE CENTER WAS BOMBED. MORE COPS AND FIREMEN SHOULD HAVE DIED. MORE BOMBS SHOULD HAVE DROPPED AND MORE PEOPLE SHOULD HAVE BEEN KILLED. WE'VE GOT SOMETHING FOR YOUR A----.
>
> Deponent states that a total of 5 defendants (Eric White, Reggie Upshaw, Steven Murdock, Jesse Atkinson and Kyle Jones) where [*sic*] yelling the above statements to a crowd of approximately 50 people. Deponent states that said people gathered around defendants and some of said people yelled back at defendants.
>
> Deponent states that defendants did approach people in the crowd and yell in their faces.
>
> Deponent further states that defendants were asked to disperse and refused to do so.
>
> Deponent states that defendants' conduct caused the crowd to gather and arguments to ensue.

Arguing that the complaint does not allege that he acted with the requisite intent to incite a riot, defendant contends that the complaint alleges merely that he "spoke in praise of the assault on the World Trade Center and stated that worse should have happened," but does not allege that "defendant urged or encouraged people to commit acts of terrorism or treason." . . . Defendant analogizes his conduct to "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence" in contrast to "preparing a group for violent action and steeling it to such action." In defendant's view, "the language attributed to defendant was an expression of a political nature, intended to spur debate and thought, not to create the type of public harm contemplated by the statute."

In analyzing whether the allegations in the complaint evince defendant's intent that his alleged conduct led to riotous behavior, and whether his alleged conduct created a clear and present danger of riotous behavior, it is necessary to consider defendant's words and deeds in the context in which he and his alleged accomplices spoke and acted. The alleged crime took place only days after one of the greatest catastrophes this nation has suffered—the overwhelming brunt of which was felt most keenly here in New York—and within sight of the massive smoke plume emanating from the still-smoldering mass grave site that had been the twin towers of the World Trade Center. It took place while many New Yorkers were grieving for the loss of loved ones or praying in hope that the missing might yet be found, and as New Yorkers, indeed, all Americans, held their collective breath at what, at the time, appeared to be the likelihood, if not the inevitability, of additional terrorist attacks. It was under these circumstances that defendant and his cohorts allegedly chose a crowded 42nd Street near Times Square as their venue not merely to engage in what any reasonable person would consider to be a vile and morally reprehensible diatribe, but to intentionally confront the gathering crowd, at point blank range, for the purpose of inciting riotous behavior. It is estimated that approximately 3,000 people died in the World Trade Center attack. By comparison, 2,403 Americans were killed in the attack on Pearl Harbor.

There can be no doubt that the words and deeds alleged in the complaint make out the elements of the crime of inciting to riot. According to the complaint, defendant and his accomplices used extremely inflammatory language calculated to cause unrest in the crowd; praising the tragic deaths of thousands of innocents at the hands of terrorists and wishing for even more carnage while the threat of further attacks loomed over the city cannot be considered "an expression of a political nature, intended to spur debate and thought, not to create the type of public harm contemplated by the statute" to use defendant's words. The talismanic phrase "freedom of speech" does not

(Continued)