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2 only African-American juror in the jury pool. Dolphy, who
3 is African-American, objected on Batson grounds, and the
4 explanation given by the prosecution was that the juror was
5 obese. Because the record does not show that the trial
6 court engaged in the third, critical step of the Batson
7 analysis, we vacate the order of the district court and
8 remand for further proceedings.

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11 Appellant.
12

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16 State of New York, for
17 Respondent-Appellee.
18

19 DENNIS JACOBS, Chief Judge:
20

21 Seth Dolphy appeals from an Order of the United States
22 District Court for the Northern District of New York (Kahn,
23 J.) dismissing his petition for habeas corpus relief under
24 28 U.S.C. § 2254. During jury selection in Dolphy's state
25 court trial on drug, weapon, and attempted assault charges,
26 the prosecution used a peremptory challenge to strike the
27 only African-American in the jury pool. Dolphy, who is
28 African-American, objected through counsel on Batson

1 grounds. The explanation given by the prosecution was that
2 the juror was obese. The trial judge denied the Batson
3 objection on the ground: "I'm satisfied that is a race
4 neutral explanation." Because the record does not show
5 whether the trial court made an ultimate determination on
6 the issue of discriminatory intent, we vacate the Order of
7 the district court and remand for further proceedings.

8 9 **BACKGROUND**

10 Dolphy was indicted in March, 1997 on drug, weapon, and
11 attempted assault charges. Jury selection began on
12 September 3, 1997. Sixteen prospective jurors were
13 initially called, seven of whom were peremptorily struck by
14 the prosecution. Of the seven replacements, one was
15 African-American. She said that she would be fair and open-
16 minded and would decide any matter "based on the evidence."
17 Asked if there was anything that would affect her
18 impartiality, she said no.

19 The prosecution peremptorily struck the juror, and the
20 defense immediately objected on the basis of Batson v.
21 Kentucky, 476 U.S. 79 (1986), noting that the juror, like
22 Dolphy, was African-American. During a chambers conference

1 on the objection, the trial court determined that the
2 defense had made a prima facie showing under Batson and put
3 the burden on the prosecution to advance a race-neutral
4 explanation for its removal of the juror. The prosecutor
5 said he struck the juror because of "her appearance." The
6 specific feature of her appearance was her weight, as he
7 explained:

8 I do not select overweight people on the
9 jury panel for reasons that, based on my
10 reading and past experience, that heavy-
11 set people tend to be very sympathetic
12 toward any defendant.

13
14 The trial court asked whether the prosecutor was "saying
15 that race had nothing to do with it," and the prosecutor
16 responded "that's correct." The trial court then ruled:

17 Very well. Strike will stand. Defense
18 has its exception, record's preserved,
19 that will be an issue.

20
21 Defense counsel immediately renewed the objection, arguing
22 that the prosecutor had allowed overweight people on juries
23 in other cases. The trial court responded:

24 [T]hat's neither here nor there. I'm
25 satisfied that is a race neutral
26 explanation, so the strike stands.
27 Defense has its exception.

28
29 The chambers conference ended and jury selection continued.

30 At the conclusion of jury selection, defense counsel

1 moved for a mistrial, noting that two of the seated jurors
2 were overweight. The trial court observed that "overweight
3 is a subjective term," tactfully suggested that the judge
4 and defense counsel were both "a little overweight" and
5 could stand to lose a few pounds, and opined that the
6 excluded juror was (by contrast) "grossly overweight."

7 Dolphy was convicted on all counts, and the Appellate
8 Division of the New York State Supreme Court affirmed the
9 conviction. See People v. Dolphy, 257 A.D.2d 681, 685
10 N.Y.S.2d 485 (3d Dep't 1999). As to Batson, the Appellate
11 Division concluded that the prosecution had presented a
12 race-neutral explanation for the strike and that defendant's
13 "bald contention that the explanation was pretextual" did
14 not merit reversing the conviction. Id. The New York State
15 Court of Appeals denied leave to appeal. See People v.
16 Dolphy, 93 N.Y.2d 872, 689 N.Y.S.2d 434 (N.Y. 1999) (Table).

17 Dolphy filed this § 2254 petition pro se in the United
18 States District Court for the Northern District of New York
19 on September 11, 2000. The petition argued: (1) that the
20 prosecution improperly removed the African-American juror
21 from the jury pool; (2) that the prosecution made
22 inflammatory remarks that denied Dolphy due process; and (3)

1 that Dolphy's trial counsel was constitutionally
2 ineffective. The petition was referred to Magistrate Judge
3 DiBianco, whose Report and Recommendation concluded that the
4 trial court misapplied Batson when it accepted the
5 prosecution's proffered race-neutral explanation without
6 assessing credibility or pretext. The Magistrate Judge
7 recommended denying Dolphy's petition on the prosecutorial
8 misconduct and ineffective assistance of counsel claims.

9 Both parties filed objections. The district court
10 adopted the Report and Recommendation with respect to
11 prosecutorial misconduct and ineffective assistance, but
12 rejected the Report with respect to Batson. The district
13 court held that the required credibility finding was
14 implicit in the trial court's rejection of the defendant's
15 Batson challenge. Specifically, the court reasoned that
16 neither Supreme Court precedent nor the precedent of this
17 Circuit required a trial court to make an explicit
18 credibility determination at the third stage of the Batson
19 analysis. This Court granted a certificate of appealability
20 on the Batson issue only.

1 agree with Dolphy's first argument, because we cannot say
2 that the trial court made a clear credibility finding.

3 The three stages of the Batson analysis are well-known:
4 once a prima facie showing of purposeful discrimination has
5 been made, the burden shifts to the prosecution to proffer a
6 race-neutral explanation for the strike, at which point the
7 court must determine whether the defendant has established
8 purposeful discrimination. Batson, 476 U.S. at 96-98.

9 "[T]he third step of the Batson inquiry requires a trial
10 judge to make an ultimate determination on the issue of
11 discriminatory intent based on all the facts and
12 circumstances." Jordan v. Lefevre, 206 F.3d 196, 200 (2d
13 Cir. 2000) (internal quotation and citation omitted).

14 Trial courts applying the third Batson prong need not
15 recite a particular formula of words, or mantra. Galarza v.
16 Keane, 252 F.3d 630, 640 n.10 (2d Cir. 2001). An
17 "unambiguous rejection of a Batson challenge will
18 demonstrate with sufficient clarity that a trial court deems
19 the movant to have failed to carry his burden to show that
20 the prosecutor's proffered race-neutral explanation is
21 pretextual." Messiah v. Duncan, 435 F.3d 186, 198 (2d Cir.
22 2006). However, we have repeatedly said that a trial court

1 must somehow "make clear whether [it] credits the non-moving
2 party's race-neutral explanation for striking the relevant
3 panelist." Messiah, 435 F.3d at 198; see Galarza, 252 F.3d
4 at 636 ("We have repeatedly emphasized that a trial court
5 may not deny a Batson motion without determining whether it
6 credits the race-neutral explanations for the challenged
7 peremptory strikes."); Jordan, 206 F.3d at 200 ("Jordan now
8 declares that the district court's conclusory statement that
9 the prosecutor's explanations were race neutral did not
10 satisfy Batson's third step. We agree."); Barnes v.
11 Anderson, 202 F.3d 150, 156 (2d Cir. 1999) (holding that
12 "denial of a Batson motion without explicit adjudication of
13 the credibility of the non-movant's race-neutral
14 explanations for challenged strikes" constitutes error).

15 We cannot say that the trial court properly applied
16 Batson in this case. While the prosecution's proffered
17 explanation was facially race-neutral, it rested
18 precariously on an intuited correlation between body fat and
19 sympathy for persons accused of crimes (seemingly without
20 regard to the weight of the defendant). Yet the trial
21 court's initial ruling was made without inquiry or finding,
22 as though the ground for making the strike was self-evident:

1 "Very well. Strike will stand." And when defense counsel
2 immediately renewed his objection, the judge's words seemed
3 to assume that a race-neutral explanation (Batson step two)
4 was decisive and sufficient: "I'm satisfied that is a race
5 neutral explanation, so the strike stands." As in Jordan,
6 such a conclusory statement does not necessarily indicate--
7 even by inference--that the trial court credited the
8 prosecution's explanation, especially since (i) the judge's
9 words suggested that the proffer of a race-neutral
10 explanation was itself enough, and (ii) the explanation
11 given here lends itself to pretext. (Which side is favored
12 by skinny jurors?) Defense counsel later pointed out that
13 several overweight jurors had been seated without objection,
14 but the trial court rejected that further attack on the
15 prosecutor's motives after visually assessing the jurors'
16 relative obesity. Our review of this point is further
17 confounded because the trial court otherwise sidestepped the
18 apparent inconsistency.

19
20 Because the trial court failed to assess the
21 credibility of the prosecution's explanation, it follows
22 that there was no adjudication of Dolphy's Batson claim on

1 the merits, and neither we nor the district court must defer
2 to the trial court under AEDPA. Spears, 459 F.3d at 203.
3 Rather, the federal courts may determine, de novo, whether
4 the peremptory strike of the juror violated Dolphy's
5 constitutional rights. Id. We therefore vacate the
6 district court's Order and remand this matter for further
7 proceedings. The district court may, in its discretion,
8 hold a hearing to reconstruct the prosecutor's state of mind
9 at the time of jury selection, and thereby determine whether
10 the proffered race-neutral explanation for the striking of
11 the African-American juror was pretextual; or, if the
12 passage of time has made such a determination impossible or
13 unsatisfactory, the district court may grant the writ
14 contingent on the state granting Dolphy a new trial. See
15 Jordan, 206 F.3d at 202.