

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 22 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 17-10510

Plaintiff-Appellee,

D.C. No. 3:16-cr-00029-MMD

v.

MEMORANDUM*

ROBERT GENE RAND,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, District Judge, Presiding

Argued and Submitted February 8, 2019
San Francisco, California

Before: PAEZ and BERZON, Circuit Judges, and FEINERMAN,** District Judge.

Robert Gene Rand appeals his 96-month sentence for involuntary manslaughter (“Count One”), 18 U.S.C. § 1112(a), and 120-month sentence for distribution of a controlled substance (“Count Two”), 21 U.S.C. § 841(a)(1), (b)(1)(C). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

The appellate waiver in Rand’s plea agreement does not preclude consideration of the merits of his appeal. The government concedes that Rand may appeal his sentence for Count One. We hold he also may appeal his sentence for Count Two. The appellate waiver was confusing and internally inconsistent, and the district court’s colloquy with the parties at the plea hearing illustrated and added to the confusion. *See United States v. Spear*, 753 F.3d 964, 968 (9th Cir. 2014) (“We have steadfastly applied the rule that any lack of clarity in a plea agreement should be construed against the government as drafter.”) (internal quotation marks and brackets omitted). Moreover, the district court told Rand that he could appeal his sentence, rendering unenforceable any waiver. *See United States v. Arias-Espinosa*, 704 F.3d 616, 618 (9th Cir. 2012) (“We have held that a district court’s clear statement that a defendant has the right to appeal renders unenforceable the defendant’s prior waiver of this right in a plea agreement.”).

On the merits, the district court’s holding that Rand failed to meet his burden of proving that he qualified for an acceptance of responsibility reduction under U.S.S.G. § 3E1.1 was not clearly erroneous. *See United States v. Rodriguez*, 851 F.3d 931, 949 (9th Cir. 2017) (explaining the burden and standard of review); *see also Cox v. Dep’t of Soc. & Health Servs.*, 913 F.3d 831, 840 (9th Cir. 2019) (“[W]e may affirm on any ground supported by the record, even if it differs from the district court’s rationale.”). “[F]alsely den[ying], or frivolously contest[ing],

relevant conduct that the court determines to be true” is “inconsistent with acceptance of responsibility,” U.S.S.G. § 3E1.1 cmt. n.1(A), as is “plac[ing] responsibility on others” for one’s unlawful actions, *United States v. Doe*, 778 F.3d 814, 827 (9th Cir. 2015); *see also United States v. Osinger*, 753 F.3d 939, 949 (9th Cir. 2014). During his safety valve proffer and in his sentencing memorandum, Rand falsely denied or frivolously contested offense conduct by stating that he believed at the time that his prescribing practices were reasonable. Those statements also reflected an attempt to shift blame for his criminal conduct onto his patients. It does not matter whether Rand’s statements contested the specific examples of unlawful conduct set forth in his plea agreement, as those examples were illustrative, not exhaustive.

The district court’s holding that Rand failed to accept responsibility under U.S.S.G. § 3E1.1 is not inconsistent with its finding that Rand truthfully provided information to the government for purposes of safety valve relief under 18 U.S.C. § 3553(f)(5) and U.S.S.G. § 5C1.2(a)(5). Among other explanations for the different results, acceptance of responsibility turns on contrition *for the charged offense*, such that failing to “admit[] the conduct comprising the offense(s) of conviction” is not acceptance. U.S.S.G. § 3E1.1. That remains the case even if the defendant’s proffered alternative account is truthful, and thus qualifies him for safety valve relief. *See* U.S.S.G. § 5C2.1(a)(5) (providing that a defendant

qualifies for safety valve relief only if she “has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan”); *United States v. Rangel-Guzman*, 752 F.3d 1222, 1226-27 (9th Cir. 2014).

Because the district court reasonably held that Rand had not accepted responsibility, the government did not breach the plea agreement by arguing against the acceptance of responsibility reduction.

AFFIRMED.